

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

NAVIGATORS INSURANCE COMPANY,
a foreign corporation,

No. 03:12-cv-02076-HU

Plaintiff,

vs.

K & O CONTRACTING, LLC, an Oregon
limited liability company; TOM
WALSH & CO., an Oregon corporation;
and HOME FORWARD, an Oregon Public
Body Corporate and Politic, *fka*
Housing Authority of Portland, an
Oregon Public Body Corporate and
Politic;

**FINDINGS & RECOMMENDATIONS
ON MOTION FOR SUMMARY JUDGMENT**

Defendants.

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1 HUBEL, Magistrate Judge:

2 In this action, plaintiff Navigators Insurance Company
 3 ("Navigators") seeks a declaration that it has no duty to defend
 4 or indemnify any of the defendants in connection with a civil
 5 action filed in Multnomah County Circuit Court entitled *Home*
 6 *Forward fka Housing Authority of Portland v. Tom Walsh & Co.*,
 7 No. 1207-08537 (the "Underlying Action"). Currently before the
 8 court is a motion for summary judgment filed by Navigators.
 9 Dkt. #26. The matter is fully briefed, and the court heard oral
 10 argument on the motion on September 23, 2013. The undersigned
 11 submits the following findings and recommended disposition of
 12 the case pursuant to 28 U.S.C. § 636(b)(1)(B).

13 Preliminarily, the court notes that although the motion was
 14 filed as to all three defendants, Navigators subsequently
 15 settled its claims against the defendant Tom Walsh & Co.
 16 ("Walsh"), and Walsh has been dismissed from the case. See Dkt.
 17 ##40 & 41. Therefore, the motion for summary judgment is moot as
 18 to Walsh. In addition, despite being alerted that its failure
 19 to respond would result in waiver of argument, see Dkt. #37, the
 20 defendant Home Forward did not respond to the motion for summary
 21 judgment. As a result, as to Home Forward, the court considers
 22 the facts set forth by Navigators in its memorandum to be
 23 "undisputed for purposes of the motion." See Fed. R. Civ. P.
 24 56(e)(2).

25 26 **BACKGROUND FACTS**

27 The facts underlying this case are undisputed. Sometime in
 28 approximately 2004 to 2005, Home Forward contracted with Walsh

1 to act as general contractor for construction of the Willow Tree
2 Apartments in Portland, Oregon, a complex consisting of eighteen
3 residential units and a community center. See Dkt. #28-2, ¶¶ 2-
4 4. The defendant K & O Contracting, LLC ("K&O") was one of
5 Walsh's subcontractors for certain portions of the project. See
6 Dkt. #28-4, ¶ 6. At some point after construction was complete,
7 Home Forward "began experiencing various water leaks and water
8 intrusion into the interiors" of the apartments and the
9 community center, resulting in current and ongoing property
10 damage of at least \$1.65 million. Dkt. #28-2, ¶ 9; see *id.*, ¶
11 10.

12 Home Forward notified Walsh of these problems, claiming they
13 were the result of "construction defects, design defects, viola-
14 tions of the applicable state and local building codes, and
15 violations of the relevant industry standards," involving the
16 exterior walls; windows and doors; decks, balconies, walkways,
17 and landings; pitched roofing; and some miscellaneous areas of
18 the property. *Id.*, ¶ 10. On February 9, 2012, Walsh notified
19 K&O that K&O "may be held responsible for some of the alleged
20 defects and/or damages." Dkt. #28-8, p. 2. In the notice
21 letter, Walsh stated, "Upon information and belief, Willow Tree
22 was constructed in 2004-2005." *Id.*

23 Navigators issued Commercial General Liability policies to
24 K&O, providing coverage from July 12, 2010, through July 12,
25 2012 (collectively, the "Policy"). Dkt. ##29-1, 29-2. K&O
26 tendered defense and indemnity on Walsh's behalf to Navigators.
27 See Dkt. #28-10. On March 6, 2012, Navigators responded to K&O,
28 stating Navigators had "no duty to defend or indemnify [Walsh]

1 for this claim," because Walsh was neither a named insured, nor
2 an additional insured under the Policy. *Id.*, pp. 2, 10. In
3 addition, Navigators stated Endorsement ANF ES 164 7/05 to the
4 policy "exclude[d] work done before inception of K&O's policies
5 with Navigators." *Id.*, p. 10. Navigators noted information
6 provided by Walsh indicated the Willow Tree Apartments "were
7 constructed between 2004 and 2005," which was "well before the
8 inception of the Navigators policies[.]" *Id.*, pp. 2, 10.
9 Therefore, because "work on the project was completed in 2005,"
10 Navigators determined it had "no duty [to] indemnify or defend
11 K&O Contracting or Tom Walsh in this claim." *Id.*, p. 11.
12 Navigators directed K&O to provide it with a copy of any lawsuit
13 filed with regard to the matter for review. *Id.*, p. 12.

14 On July 6, 2012, Home Forward filed the Underlying Action
15 against Walsh, and others, in connection with "certain
16 development, construction and/or property management activities"
17 performed by Walsh at the Willow Tree project. Dkt. #28-2, p.
18 3. Home Forward asserted claims against Walsh in the Underlying
19 Action for breach of contract, negligence, and contractual
20 indemnity. *Id.*, pp. 7-10, 14-16, 20-22.

21 On or about August 10, 2012, Walsh filed a third-party
22 complaint in the Underlying Action against K&O and other subcon-
23 tractors. See Dkt. #28-4. Walsh asserted claims against K&O
24 for contractual and common-law indemnity, and contribution. *Id.*
25 Walsh repeated the list of alleged defects set forth in Home
26 Forward's complaint, alleging K&O was liable for certain of the
27 alleged defects under the terms of the subcontract between Walsh
28 and K&O. See Dkt. #28-4, pp. 3-5. Nowhere in Walsh's third-

1 party complaint (and, indeed, nowhere in Home Forward's
2 complaint against Walsh in the Underlying Action) are any
3 allegations made regarding the dates when construction took
4 place, or was completed, on the Willow Tree project. See Dkt.
5 #28-4.

6 K&O forwarded Walsh's third-party complaint to Navigators
7 for review. Navigators determined that Walsh's third-party
8 complaint "was ambiguous in time, but nonetheless alleged
9 defects in the 2005 original construction" of the Willow Tree
10 project. Dkt. #28, ¶ 13. Despite this determination, Navigators
11 undertook the defense of K&O in the Underlying Action, subject
12 to an express reservation of rights. See Dkt. ##28-6, 28-7.
13 Navigators subsequently filed the current action, seeking a
14 declaration that it owes no duty to defend or indemnify K&O,
15 Walsh, or Home Forward in connection with the Underlying Action.
16 As noted previously, Walsh has settled its claims with
17 Navigators, and Home Forward takes no position on the motion.
18 In addition, K&O "does not contest Navigators' motion as it
19 relates to the duty to indemnify K&O in the Underlying
20 [Action]," arguing only that Navigators has an ongoing duty to
21 defend K&O in the Underlying Action. Dkt. #33, p. 5.

22 In its motion for summary judgment, Navigators argues the
23 Policy's exclusion for prior completed work is dispositive of
24 the case, and the court should issue an order declaring that
25 Navigators has no duty to defend or indemnify K&O or Home
26 Forward in the Underlying Action. See Dkt. #27.

27 K&O argues Navigator has a duty to defend K&O because
28 Walsh's third-party complaint against K&O in the Underlying

1 Action contains no allegations from which application of the
 2 prior completed work exclusion could be determined; that is, the
 3 third-party complaint contains no allegations at all regarding
 4 the dates when K&O completed its work on the Willow Tree
 5 project. Dkt. #33. K&O notes Navigators is attempting to rely
 6 on the notice of claim sent by Walsh's attorneys to K&O, which
 7 states, "[u]pon information and belief, [that] Willow Tree was
 8 constructed in 2004-2005." Dkt. #28-8, p. 2. K&O argues the
 9 duty to defend is determined exclusively by the allegations set
 10 forth in the third-party complaint and the terms of the policy,
 11 and Navigators may not rely on extrinsic materials, such as
 12 Walsh's notice of claim, as a basis for denying its duty to
 13 defend. Dkt. #33, *passim*. K&O relies on *Bresee Homes, Inc. v.*
 14 *Farmers Insurance Exchange*, 353 Or. 112, 293 P.3d 1036 (2012),
 15 in support of its position. Navigators argues *Bresee* is distin-
 16 guishable on its facts, and further, that the court may consider
 17 extrinsic evidence that incontrovertibly establishes the insurer
 18 has no duty to defend. Dkt. #38, *passim*. Navigators relies
 19 primarily on *Casey v. Northwestern Security Insurance Co.*, 260
 20 Or. 485, 491 P.2d 208 (1971); and *Fred Shearer & Sons, Inc. v.*
 21 *Gemini Insurance Co.*, 237 Or. App. 468, 240 P.3d 67 (2010)).

22 23 **SUMMARY JUDGMENT STANDARDS**

24 Summary judgment should be granted "if the movant shows that
 25 there is no genuine dispute as to any material fact and the
 26 movant is entitled to judgment as a matter of law." Fed. R.
 27 Civ. P. 56(c)(2). In considering a motion for summary judgment,
 28 the court "must not weigh the evidence or determine the truth of

1 the matter but only determine whether there is a genuine issue
2 for trial." *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800
3 (9th Cir. 2002) (citing *Abdul-Jabbar v. General Motors Corp.*, 85
4 F.3d 407, 410 (9th Cir. 1996)).

5 The Ninth Circuit Court of Appeals has described "the
6 shifting burden of proof governing motions for summary judgment"
7 as follows:

8 The moving party initially bears the burden
9 of proving the absence of a genuine issue of
10 material fact. *Celotex Corp. v. Catrett*,
11 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.
12 Ed. 2d 265 (1986). Where the non-moving
13 party bears the burden of proof at trial,
14 the moving party need only prove that there
15 is an absence of evidence to support the
16 non-moving party's case. *Id.* at 325, 106 S.
17 Ct. 2548. Where the moving party meets that
18 burden, the burden then shifts to the non-
19 moving party to designate specific facts
20 demonstrating the existence of genuine
21 issues for trial. *Id.* at 324, 106 S. Ct.
22 2548. This burden is not a light one. The
23 non-moving party must show more than the
24 mere existence of a scintilla of evidence.
25 *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
26 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202
27 (1986). The non-moving party must do more
28 than show there is some "metaphysical doubt"
as to the material facts at issue.
*Matsushita Elec. Indus. Co., Ltd. v. Zenith
Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct.
1348, 89 L. Ed. 2d 528 (1986). In fact, the
non-moving party must come forth with
evidence from which a jury could reasonably
render a verdict in the non-moving party's
favor. *Anderson*, 477 U.S. at 252, 106 S. Ct.
2505. In determining whether a jury could
reasonably render a verdict in the non-
moving party's favor, all justifiable
inferences are to be drawn in its favor.
Id. at 255, 106 S. Ct. 2505.

In re Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th
Cir. 2010).

DISCUSSION

The parties agree that Oregon law governs the substantive issues in this case. The "fighting issue" between the parties, in determining whether Navigators has a duty to defend K&O in the Underlying Action, is whether the court may look outside the allegations on the face of Walsh's third-party complaint (or perhaps Home Forward's complaint against Walsh), and the Policy language, to determine whether the alleged conduct occurred within the time period during which K&O was covered by the Policy.

In *Ledford v. Gutoski*, 319 Or. 397, 877 P.2d 80 (1994), the Oregon Supreme Court explained the general standards for determining whether an insurer has a duty to defend its insured against a particular claim. The *Ledford* court held the insurer's duty to defend "depends on two documents: the complaint and the insurance policy," with the duty to defend arising when "the claim against the insured stated in the complaint could, without amendment, impose liability for conduct covered by the policy." *Ledford*, 319 Or. at 399-400, 877 P.2d at 82 (citing *Nielsen v. St. Paul Cos.*, 283 Or. 277, 280, 583 P.2d 545, 547 (1978); *Oakridge Comm. Ambulance v. U.S. Fidelity & Guar. Co.*, 278 Or. 21, 24, 563 P.2d 164, 166 (1977); *Ferguson v. Birmingham Fire Ins.*, 254 Or. 496, 507, 690 P.2d 342, 347 (1969)). In making this analysis, "the court looks only at the facts alleged in the complaint to determine whether they provide a basis for recovery that could be covered by the policy[.]" *Ledford*, 319 Or. at 400, 877 P.2d at 82 (citations omitted). The face of the complaint, itself, should allow the insurer to

1 determine whether it has a duty to defend the insured. *Id.* The
2 duty to defend arises "if the complaint provides *any basis* for
3 which the insurer provides coverage." *Ledford*, 319 Or. at 400,
4 877 P.2d at 83 (emphasis in original; citation omitted). This
5 is true even if some of the conduct alleged in the complaint
6 falls outside the policy's coverage, with any ambiguity as to
7 coverage being "resolved in favor of the insured." *Id.* The
8 "analysis focuses on the *allegations* in the complaint[] rather
9 than the claims identified in it." *Nat'l Union Fire Ins. Co. of*
10 *Pittsburgh Pa. v. Starplex Corp.*, 220 Or. App. 560, 584, 188
11 P.3d 332, 346-47 (2008) (emphasis in original; internal
12 quotation marks, citation omitted); accord *Anderson Bros., Inc.*
13 *v. St. Paul Fire & Marine Ins. Co.*, ___ F.3d ___, 2013 WL
14 4615055, at *9 (9th Cir. Aug. 30, 2013) (quoting *Starplex*).

15 Thus, in general, the court is limited to considering only
16 the facts alleged in the complaint and the policy language,
17 "regardless of whether information extrinsic to the complaint
18 could establish that the claim at issue is not covered." *Keizer*
19 *Campus Ops., LLC v. Lexington Ins. Co.*, slip op., 2013 WL
20 4786521, at *2 (D. Or. Sept. 5, 2013) (Aiken, CJ) (emphasis
21 added; citing *Ledford*, 319 Or. at 400, 877 P.2d at 83). The
22 court looks to these two documents "to determine whether the
23 claim could impose liability for occurrences covered by the
24 policy." *Spada v. Unigard Ins. Co.*, 80 Fed. Appx. 27, 29 (9th
25 Cir. 2003) (citing *Ledford*, 319 Or. at 400, 877 P.2d at 82).
26 The courts have recognized several exceptions to this general
27 rule. For example, an exception noted by Judge Aiken in *Keizer*
28 allows a court to consider "extrinsic evidence of the date a

1 claim was noticed to an insured when analyzing an insurer's duty
2 to defend under a claims-made policy." *Id.* (internal quotation
3 marks, citation omitted). Another limited exception applies "in
4 instances when courts are attempting to determine whether an
5 organization or individual was an insured under a policy."
6 *Clarendon Am. Ins. Co. v. State Farm Fire & Cas. Co.*, slip op.,
7 2013 WL 54032, at *6 (D. Or. Jan. 3, 2013) (Brown, J.); see *Fred*
8 *Shearer & Sons, Inc. v. Gemini Ins. Co.*, 237 Or. App. 468, 240
9 P.3d 67 (2010). Neither of these exceptions applies to the
10 exclusion Navigators is pressing here.

11 Still another exception applies when there is a judicial
12 determination that precludes coverage, such as the criminal
13 conviction of an insured for intentional injury which estops the
14 insured from claiming the injury was unintentional. See *Bresee*,
15 53 Or. at 124-25, 293 P.3d at 1043 (discussing the holding in
16 *Casey*, noting the exception is "a narrow one"). Navigators
17 argues K&O's concession that Navigators has no duty to indemnify
18 K&O in the Underlying Action "is the equivalent of an
19 incontrovertible 'court determination that precludes coverage
20 like the criminal court adjudication considered in *Casey*.'" *Dkt. #38*, p. 13 (quoting *Bresee*, 353 Or. at 125, 293 P.3d at
22 1043). That argument ignores Oregon's recognition that "[t]he
23 duty of an insurer to defend is not coextensive with the duty to
24 indemnify." *Klamath Pac. Corp. v. Reliance Ins. Co.*, 151 Or.
25 App. 405, 413, 950 P.2d 909, 913 (1997).

26 Despite the efforts of Navigators to distinguish *Bresee*, the
27 case appears to be directly on point in the present inquiry. On
28 April 2, 1999, Bresee Homes entered into a contract with the

1 Joneses to act as contractor for construction of the Joneses'
2 custom home. On July 15, 2005, the Joneses sued Bresee,
3 alleging improper installation of flashing that had caused the
4 exterior synthetic stucco finish on the home to fail due to
5 water leakage. Bresee tendered the claim to its insurer, Farmers
6 Insurance Exchange ("Farmers"), under a commercial liability
7 policy issued by Farmers to Bresee, that was in effect from the
8 late 1980s until June 17, 2003. Farmers "denied the tender,
9 citing the 'products - completed operations hazard' exclusion in
10 the policy." *Bresee*, 353 Or. at 114-15, 293 P.3d at 1038.

11 Bresee sued Farmers for breach of contract and a declaratory
12 judgment that Farmers had a duty to defend Bresee in the
13 Joneses' action, and to indemnify it for any liability to the
14 Joneses. The parties filed cross-motions for summary judgment.
15 Among other things, Bresee argued the trial court should
16 consider extrinsic evidence that Farmers had adjusted and
17 settled numerous nearly-identical damage claims made against
18 Bresee by other homeowners. Bresee claimed the extrinsic
19 evidence was relevant to demonstrate the parties' intent with
20 regard to similar claims, and also to prove "Farmers had waived
21 its position that the 'products - completed operations hazard'
22 endorsement precluded any coverage of the Joneses' claim against
23 Bresee." *Bresee*, 353 Or. at 115, 293 P.3d at 1938.

24 The trial court granted Farmers's motion and denied Bresee's
25 motion. Although the trial court found the Joneses' property
26 damage claim was a type of damage covered under the policy, it
27 concluded the Joneses' claim was defeated by the "products -
28 completed operations hazard" exclusion. Further, the trial

1 court "determined that Bresee's claim for a defense was not well
2 taken because Bresee, in submitting evidence on summary
3 judgment, had not established when Bresee's subcontractor had
4 completed the work and when the alleged damage had occurred."
5 *Bresee*, 353 Or. at 115-16, 293 P.3d at 1038. The Oregon Court
6 of Appeals affirmed. *Bresee*, 353 Or. at 116, 293 P.3d at 1039.

7 The Oregon Supreme Court reversed. Preliminarily, the court
8 noted that claims for a defense and for coverage under a policy
9 "invoke separate contractual obligations governed by different
10 legal standards." *Id.* The court relied on *Ledford* in holding
11 the duty to defend arises "[a]s long as the complaint contains
12 allegations that, without amendment, state a basis for a claim
13 covered by the policy[.]" *Bresee*, 353 Or. at 117, 293 P.3d at
14 1039; see *id.*, 353 Or. at 116-17, 393 P.3d at 1039. The *Bresee*
15 court noted "the key question is whether the court can
16 reasonably interpret the allegations [in the complaint] to
17 include an incident or injury that falls within the coverage of
18 the policy. . . . '[N]either the failure to identify correctly
19 the claims nor the failure to state them separately defeats the
20 duty to defend.'" *Bresee*, 353 Or. at 117, 293 P.3d at 1039
21 (quoting *Marleau v. Truck Ins. Exch.*, 333 Or. 82, 91, 37 P.3d
22 148, 153 (2001); citing *Blohm v. Glens Falls Ins. Co.*, 231 Or.
23 410, 416, 373 P.2d 412, 418 (1962)).

24 The *Bresee* court reviewed the policy issued by Farmers,
25 including the policy's exclusions. The court held, first, that
26 "the coverage agreement, and specifically the duty to defend
27 Bresee, would apply to the Joneses' claims if the property
28 damages that their complaint sought constitute[d] 'property

1 damage' to which the policy applied." *Bresee*, 353 Or. at 121,
2 293 P.3d at 1041. Second, the court noted the policy
3 incorporated certain exclusions, among them the "products -
4 completed operations hazard" exclusion relied upon by Farmers.
5 *Id.* The court found this exclusion was "itself subject to an
6 exception . . . for '[w]ork that has not been completed.'" *Bresee*,
7 353 Or. at 121-22, 293 P.3d at 1041. The court
8 explained that the text of the policy must be construed as a
9 whole, rather than viewing specific portions - such as endorse-
10 ments, exclusions, and exceptions - in isolation. *Id.* The
11 court explained further:

12 We may conclude, after construction of the
13 policy as a whole, that a particular
14 provision nullifies or limits coverage or
15 that one policy provision controls over
16 another. That conclusion, however, must
17 result from the application of familiar
18 principles of interpretation to the policy
19 as a whole, not from an attempt to give
20 particular weight or effect to one provision
21 because it is an exclusion or exception to
22 the policy's coverage.

18 *Bresee*, 353 Or. at 122, 293 P.3d at 1041-42.

19 For purposes of applying the "products - completed
20 operations hazard" exclusion, the *Bresee* court found it
21 significant that the Joneses' complaint did not state "whether
22 the claimed damages from the alleged breach of contract and
23 negligence occurred before or after the completion of *Bresee's*
24 work. . . . The allegations describe events and damage that
25 occurred in the past, but which could have occurred at any time
26 after contract execution. The allegations describing past
27 deficient performance and damage do not necessarily say anything
28

1 about the date Bresee completed its work." *Bresee*, 353 Or. at
2 122, 293 P.3d at 1042.

3 Farmers argued Bresee had the burden to come forward with
4 facts to show its work was not completed at the time of the
5 alleged damage, in order to avoid the effect of the exclusion.
6 The *Bresee* court disagreed, holding "Bresee [had] no burden to
7 come forth with facts beyond those alleged in the Joneses'
8 complaint. . . . Our analysis of the duty to defend focuses on
9 those allegations whether or not different or additional facts
10 might be adduced at trial." *Bresee*, 353 Or. at 123, 293 P.3d at
11 1042. The Oregon Supreme Court held the Oregon Court of Appeals
12 "was mistaken" in considering extrinsic evidence offered by
13 Farmers to show Bresee's work was completed in 1999, and in
14 considering that Bresee had failed to offer any contradictory
15 evidence. *Id.* The court explained:

16 Farmers relied on facts concerning the com-
17 pletion of Bresee's work that were not
18 alleged in the Joneses' complaint. Farmers
19 could discern from facts alleged by the
20 Joneses and from its policy that the Joneses
21 potentially could prove that the claimed
22 damage arose before Bresee completed its
23 work. When Bresee tendered the Joneses'
24 complaint for defense, the factual question
25 of whether the claimed damages had occurred
26 before or after the completion of Bresee's
27 work was an issue that the litigation
28 between the Joneses and Bresee might
determine, and, once established, could
affect Farmers's duty to indemnify Bresee.
The potential factual determinations in that
litigation, however, *are not the facts that
governed Farmers's duty to defend Bresee.*
When Bresee tendered the Joneses' claims,
*only the facts alleged by the Joneses and
the terms of the Farmers policy governed
Farmers's duty to provide a defense.*

Bresee, 353 Or. at 123-24, 293 P.3d at 1042 (emphasis added).

1 Navigators makes arguments in the present case that mirror
2 those made by Farmers in *Bresee*, and a similar analysis applies.
3 When K&O tendered Walsh's third-party complaint to Navigators,
4 the duty of Navigators to defend K&O was governed only by the
5 allegations in Walsh's third-party complaint, and the terms of
6 the Policy. Relying solely on those documents, Navigators could
7 discern that Walsh potentially could prove K&O was responsible
8 for damage falling within the Policy's coverage language.
9 Although the *factual question* of whether the damage arose from
10 K&O's activities within the effective dates of the Policy could
11 affect the duty of Navigators to *indemnify* K&O (an issue no
12 longer contested by K&O in the present case), that factual
13 determination is irrelevant to the duty of Navigators to defend
14 K&O in the Underlying Action. *See Bresee, supra*.

15 Navigators claims the *Bresee* court's ruling "turned on the
16 fact that from the underlying complaint the insurer *could have*
17 discerned that the underlying Plaintiffs could prove property
18 damage *occurring prior to the completion of Bresee's work*."
19 Dkt. #27, p. 15 n.5 (emphasis added; citing *Bresee*, 353 Or. at
20 122, 293 P.3d at 1042). Actually, the *Bresee* court found it
21 "noteworthy" that the insurer *could not determine* from a reading
22 of the complaint whether or not the alleged damage occurred
23 "before or after the completion of Bresee's work." *Bresee*, 353
24 Or. at 122, 293 P.3d at 1042. The court noted that from reading
25 the complaint, the property damage either "occurred, or could
26 have occurred" before Bresee's work was completed. *Id.* Walsh's
27 third-party complaint contains an identical problem: it is
28 impossible to determine from the face of the complaint whether

1 or not the alleged damage was due to K&O's activities within the
2 Policy's coverage period.

3 Navigators, however, urges the court to consider Walsh's
4 original notice of claim, indicating the Willow Tree project was
5 completed in 2005. Navigators also points to admissions Home
6 Forward has made in the Underlying Action, also establishing
7 that all of Walsh's and K&O's work on the project was completed
8 prior to the inception of the Policy. Navigators argues the
9 court may "consider extrinsic evidence when that evidence goes
10 solely to a fundamental issue of coverage which does not overlap
11 the merits or engage the truth or falsity of the underlying
12 facts alleged in the underlying case." Dkt. #27, p. 15.
13 Navigators cites *Fred Shearer* in support of this conclusion,
14 arguing the case stands for the proposition that when the ques-
15 tion of coverage "depends on a factual issue which will not be
16 resolved by the underlying lawsuit, the duty to defend may
17 depend on the **actual facts** and not the allegations in the com-
18 plaint." Dkt. #27, p. 15 (emphasis in original; citing *Fred*
19 *Shearer*, 237 Or. App. at 480, 240 P.3d at 75; in turn citing
20 *Burd v. Sussex Mut. Ins. Co.*, 56 N.J. 383, 388, 267 A.2d 7, 9-10
21 (1970)). Navigators argues the issue of *when* K&O performed its
22 work on the Willow Tree project is irrelevant to the issue of
23 whether or not K&O's work on the project was defective.
24 Therefore, according to Navigators, because a determination of
25 when K&O's work was performed is irrelevant to the merits of the
26 Underlying Action, it is appropriate for this court to consider
27 extrinsic evidence establishing that K&O's work was completed
28 long before Navigators issued the Policy, thereby absolving

1 Navigators of any duty to defend K&O in the Underlying Action.
2 Dkt. #27, pp. 15-16. Navigators misconstrues the *Fred Shearer*
3 court's ruling.

4 The *Fred Shearer* court expressly held that "[i]n determining
5 whether a policy exclusion applies to the conduct at issue, we
6 look 'only at the facts alleged in the complaint to determine
7 whether they provide a basis for recovery that could be covered
8 by the policy.'" *Fred Shearer*, 237 Or. App. at 479, 240 P.3d at
9 74 (quoting *Ledford*, 319 Or. at 400, 877 P.2d at 82). Again,
10 the issue is whether the insurer reasonably can interpret any of
11 the allegations in the complaint as falling within the coverage
12 of the policy it issued. The court finds such an interpretation
13 reasonably was possible from the allegations in Walsh's third-
14 party complaint. Walsh simply alleged that K&O had performed
15 work on the Willow Tree project pursuant to a subcontract; Home
16 Forward had alleged numerous defects in the work; and Walsh was
17 seeking to hold K&O liable for its work that was found to be
18 defective. Those allegations gave rise to a duty for Navigators
19 to defend K&O in the Underlying Action. See *Casey*, 260 Or. at
20 489, 491 P.2d at 210 (upholding an insurer's contractual duty to
21 defend its insured despite any dispute about coverage).

22 Perhaps a more interesting question is when does an
23 insurer's duty to defend cease? Once Home Forward responded, on
24 August 9, 2013, to requests for admissions, indicating none of
25 Walsh's or K&O's work was performed on the Willow Tree project
26 after July 12, 2010 (the effective date of the policy Navigators
27 issued to K&O), Navigators had definitive evidence that any
28 liability attributable to K&O in the Underlying Action would not

1 be covered under the Policy. Could Navigators then cease its
 2 defense of K&O in the Underlying Action? The Oregon courts do
 3 not appear to have addressed directly the question of when the
 4 duty to defend a lawsuit ends.

5 The prevailing view among other states is that an insurer's
 6 duty to defend ends once the insurer "establishes as a matter of
 7 law that there is no possible factual or legal basis on which it
 8 might eventually be obligated to indemnify its insured under any
 9 policy provision," *Travelers Cas. & Sur. Co. v. Alfa Laval,*
 10 *Inc.*, 964 N.Y.S.2d 63 (Table), 2011 WL 9557466, at *3 (Sup. Ct.
 11 N.Y. Cty. Nov. 18, 2011) (citing cases); or, for example, when
 12 all claims that arguably could be covered have been settled or
 13 dismissed from the case, *Society Ins. v. Bodart*, 343 Wis. 2d
 14 418, 425, 819 N.W.2d 298, 30 (2012) (citing cases and treatises
 15 in agreement). See, e.g., *Employers Mut. Cas. Co. v. Donelly*,
 16 154 Idaho 499, 300 P.3d 31 (2013) (same) (Jones, J., dissenting;
 17 citing cases); *Hastings Mut. Ins. Co. v. Mosher Dolan Cataldo &*
 18 *Kelly, Inc.*, 2013 WL 1149790, at *3 (Mich. Ct. App. Feb. 14,
 19 2013) (duty to defend continues "until such time as the insurer
 20 has confined the claims against the insured to those theories
 21 that the policy would not cover") (citing *Am. Bumper & Mfg. Co.*
 22 *v. Hartford Fire Ins. Co.*, 207 Mich. App. 60, 67, 523 N.W.2d
 23 841, 844 (1994)); *Benchmark Ins. Co. v. Sparks*, 254 P.3d 617,
 24 621 (Nev. 2011) ("duty to defend is triggered whenever the
 25 potential for indemnification arises, and it continues until
 26 this potential for indemnification ceases"); *Minkler v. Safeco*
 27 *Ins. Co. of Am.*, 232 P.3d 612, 622 n.4 (Cal. 2010) ("[I]f an
 28 insurer's investigation discloses that there is, in fact, no

1 possibility of coverage . . . the insurer's duties to defend and
2 indemnify cease from that time forward.") (citing cases); *Am.*
3 *Fam. Ins. Co. v. Chamunda, Inc.*, slip op., 2008 WL 1808335, at
4 *3 (Ohio Ct. App. Apr. 23, 2008) ("In any event, an insurer's
5 duty to defend its insured ends once it is determined there is
6 no possibility of coverage under the policy.") (citing *Wedge*
7 *Prods., Inc. v. Hartford Equity Sales Co.*, 509 N.E.2d 74
8 (1987)); *Aetna Cas. & Sur. Co. v. Kentucky*, 179 S.W.3d 830, 854
9 (2005) (insurer's duty to defend "ends once the insurer
10 establishes that the liability is in fact not covered by the
11 policy") (citing cases).

12 Although the prevailing view may seem the most reasonable
13 and logical, it has never been adopted by an Oregon appellate
14 court. In the absence of a similar pronouncement by the Oregon
15 courts, the duty of Navigators to continue defending K&O in the
16 Underlying Action is ongoing. It is not for this court to
17 extend Oregon law on that issue; it is for the Oregon appellate
18 courts to determine in the first instance. As recently as 2012,
19 in *Bresee*, the Oregon Supreme Court could have addressed this
20 situation, and acknowledged that there is a "back end" to a duty
21 to defend. It did not. While a direct answer to this issue
22 from the Oregon courts is not available, the likely answer,
23 under current law, appears to be that extrinsic evidence, no
24 matter how conclusive, cannot be used to end the duty to defend
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1 in a situation like the one before the court. Therefore,
 2 Navigators's motion for summary judgment should be denied.¹

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12 13 ***SCHEDULING ORDER***

14 These Findings and Recommendations will be referred to a
 15 district judge. Objections, if any, are due by **October 11,**
 16 **2013.** If no objections are filed, then the Findings and
 17 Recommendations will go under advisement on that date. If
 18 objections are filed, then any response is due by **October 28,**

22
 23 ¹Navigators indicates that, per the parties' agreement, it
 24 limited its motion for summary judgment to the discrete issue
 25 discussed above. Navigators indicates it also has "numerous
 26 other coverage defenses that . . . operate to bar or limit the
 27 coverage available under the policy for the subject claim," and
 28 should the court deny the current motion, "Navigators reserves
 the right to rely on any and all coverage defenses that may be
 applicable to the subject claims." Dkt. #27, p. 4 n.2. Walsh
 is no longer part of the case, and K&O has conceded that
 Navigators has no duty to indemnify it in the Underlying Action.
 The court fails to see how a ruling on the current motion does
 not resolve the case entirely, in this court.

1 **2013.** By the earlier of the response due date or the date a
2 response is filed, the Findings and Recommendations will go
3 under advisement.

4 IT IS SO ORDERED.

5 Dated this 23rd day of September, 2013.

6
7 /s/ Dennis J. Hubel

8 Dennis James Hubel
9 Unites States Magistrate Judge